JD-17-20
Orlando, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS, AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC, LOCAL 835 (FREEMAN DECORATING CO.; GLOBAL EXPERIENCE SPECIALISTS, INC.)

and

DAWN GENTRY, an Individual **CASE 12–CB–233694**

and

LUIS LUGO, an Individual **CASE 12–CB–233788**

Steven Barclay, Esq., for the General Counsel.
Eric Lindstrom, Esq.*, Egan, Lev, Lindstrom & Siwica, P.A.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Kissimmee, Florida on August 7, 2019. Both Charging Parties Dawn Gentry (Gentry) and Luis Lugo (Lugo) filed original and amended charges (January 7 and March 28, 2019 for Gentry; January 8 and February 4, 2019 for Lugo). The General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing on April 29, 2019.[1] The complaint alleges that Respondent, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists, and Allied Crafts of the United States, Its Territories and Canada, AFL–CIO, CLC, (also referred to as IATSE), Local 835 (IATSE/the Union/Local 835), violated the

[1] All dates are in 2018 unless otherwise indicated.

Act by failing and refusing to provide the Charging Parties with requested information related to a grievance (Lugo) and discipline (Gentry). Respondent denies violating the Act and claims that it either timely provided any requested information, inadvertently excluded it or had no duty to furnish it.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Freeman Decorating Co. (Freeman), a corporation with an office and place of business in Orlando, Florida, has been engaged in the business of providing design and production resources for corporate events, exhibit programs, expositions and conventions throughout the United States. During the past 12 months, Freeman, in conducting its business operations purchased and received at its Orlando, Florida facility and jobsites in the State of Florida, goods valued in excess of $50,000 directly from points outside of the State of Florida. The parties admit and I find that Freeman has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Global Experience Specialists Inc. (GES), a Nevada corporation with an office and place of business in Orlando, Florida, has been engaged in the business of providing exhibition, event and entertainment experiences, exhibition planning and design, audio visual, staging, rigging, electrical, signs and graphics, installation and dismantling labor, carpet and furnishings, and transportation services. During the past 12 months, GES, in conducting its business operations, purchased and received at its Orlando, Florida facility and jobsites in the State of Florida, goods valued in excess of $50,000 directly from points outside the State of Florida. The parties admit and I find that GES has also been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find, as the parties admit, that IATSE's Local 835 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

(1) Since on or about November 16, Respondent Union has failed and refused to provide Charging Party Gentry, a member of the Union's Freeman Unit, with copies of the complaints against her relating to her conduct on a Freeman work site on November 7, 2018, and subsequent 6-month suspensions by Freeman and by Local 835.

(2) Since on or about September 4, 2018, Respondent Union has failed and refused to provide Charging Party Lugo, a member of the Union's GES Unit, with a copy of the grievance relating to his August 25, 2018 discharge by GES.

A. IATSE and Employers GES and Freeman

At all times relevant to this case, by virtue of Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the following employees of Freeman (the Freeman Unit):

> All stewards, leads, journeymen, helpers, new hires and carpet team employees employed by Freeman in the geographic jurisdictions of Respondent, Local 835, Local 60, Local 115, Local 321 and Local 412 engaged in the handling and placing of pipe, bases, drape, tables, table draping, erecting or dismantling display booths and/or exhibits, modular systems, pegboards, tack boards, drape hung or rigged, carpeting, furniture, platforms, I.D. signs within booth, floor marking, waste baskets, aisle banners, signage, table risers and Association work as it pertains to the scope of the collective-bargaining agreement between the Union and Freeman.

At all times relevant to this case, by virtue of Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the following employees of GES (the GES Unit):

> All regular part-time and casual forklift operators and freight handlers, carpentry shop employees, carpet shop employees, drapery shop employees, GEM shop employees, marshaling department employees, dispatch and receiving department employees, warehouse freight handlers and employees performing the duties of association freight work, loading and unloading of all pre-assembled GEM and handling of empty containers employed by the Employer at its Orlando, Florida facility and its show sites.

Since on or before July 1, 2014, Respondent and GES have been parties to and have maintained and enforced collective-bargaining agreements providing that Respondent is the exclusive source of referrals of employees for employment with Freeman in the Orlando, Florida area. Since on or about October 1, 2013, Respondent and Freeman have been parties to and have maintained and enforced a collective-bargaining agreement (CBA) providing that Respondent is the exclusive source of referrals of employees for employment with Freeman in the Orlando, Florida area. The Union has several types of contracts with Freeman, which include a general services contract whereby Freeman services trade shows, as well as an exhibitor-appointed contract (EAC) where clients bring in their own labor company to set up booths. The parties signed a new general services contract in March 2019, retroactive to October 1, 2018, and in effect until October 1, 2023. The Union has a general services contract with GES as well. Although their contract expired on December 31, 2018, they also signed a new contract in March 2019, retroactive to October 1, 2018, and in effect until October 1, 2023. There were no changes in the above contract terms applicable to this case. (R. Exh. 4).

At all relevant times, Mark Hardter (Hardter) has served as the business agent for IATSE Local 835. As such, he oversees all business including grievances, arbitrations, the referral hall call and assignment process and NLRB hearings. He does not oversee Local's Referral Hall

Committee (RHC), described below. (Tr. 117). Herman Dagner (Dagner) has served as the Union President, and as such, oversees and makes appointments to the RHC. John O'Dowd (O'Dowd) chairs the RHC. They have been for all relevant times agents of Respondent within the meaning of Section 2(13) of the Act. Other Local 835 employees involved in this case are Kevin Harmon (Harmon), the lead call steward for the Union, who handles referral calls and assignments, and Bonnie Cone (Cone), administrative assistant for the Union's front office, who answers telephones, maintains the RHC's files (also referred to as the RHC book) and performs other administrative duties. With the exception of O'Dowd, all of these employees testified on behalf of the Union.

B. Charging Party Dawn Gentry

1. IATSE's Referral Hall Rules and Operations

IATSE, Local 835 operates an exclusive hiring hall system that refers members and other referents to employers, such as GES and Freeman.[2] Local 835 has four part-time call stewards, including Harmon, working in its call center (also referred to as the dispatch center) who dispatch workers pursuant to the referral hall rules.

The code of conduct under which the referral hall operates is enforced by the Union's Referral Hall Committee (RHC), which has authority to charge referents for alleged major and minor offenses in violation of the rules, hear appeals of the charges and to discipline employees. Local 835 President, Dagner, who oversees the RHC and appoints its members, has held this position since 2005. The RHC does not have authority to change the rules, but according to Dagner, he can make new rules as long as they are fair (Tr. 184). The Union's referral hall rules are embodied in the document, Orlando Job Referral Procedure Exhibition Employees Local No. 835. (R. Exh. 5). The relevant portions of these referral hall rules are as follows:

> Section VII ("Suspension and Removal From The Referral List"):
>
> The Union may suspend or remove individuals from the referral list as follows:
>
> 1. Any person who commits a major or minor offense in violation of the Disciplinary Code will be notified in writing to the referents last known address listing the date and nature of the offense. The referent will be suspended ten (10) calendar days after receipt of written notice unless the person has filed a timely appeal. In case of appeal, no penalty shall be imposed until the appeal procedure has been completed except in cases of serious offense, a permanent removal shall be imposed. All letters of commendation and offenses shall be kept on file indefinitely….
>
> Section VIII ("Disciplinary Code"):
>
> 2. List of Offenses

[2] The Union identifies those employees referred out as referents since Florida, as a right to work state, requires that union membership for use of its rotational referral system is optional. Local 835 has about 1500 active referents and only a little over 300 members. (Tr. 123–124).

A. Major Offenses….

7. Conduct or behavior damaging to the Union's contractual relations with employers, or conduct or behavior that disrupts or obstructs the referral system or the Union's ability to carry out its duties and obligations….

11. Abusive, threatening, obscene, or insulting language on the job to Local 835 office personnel or during Local 835 related activities….

Section IX ("Appeals"):

1. A referent may appeal any penalty to the Referral Hall Committee…

2. Appeals must be filed in writing and received at the Union office within fourteen (14) calendar days from the date of the letter from the Union notifying the referral of the reported infraction. The written appeal must clearly and specifically describe the subject matter of the appeal and the remedy desired. The written appeal should indicate if the appellant wishes to appear in person before the Referral Committee…

3. The Referral Committee, upon notice to the appellant, shall hold a hearing on the appeal within thirty (30) days of receipt of the appeal, except for extenuating circumstances. The Referral Committee will notify the appellant of the date, time and place of the hearing if the appellant has requested to appear at the hearing. Appellants who fail to appear at the hearing shall have their appeal or complaint dismissed.

4. The Referral Committee will make a determination as to the guilt or innocence of the appellant. The decision of the Referral Committee shall be final and binding on all parties….

In addition to assisting Hardter and the business office, Cone acts as the RHC's administrative assistant (along with her assistant, Hannah Santana). As such, she receives and processes the approximately 20–30 disciplinary charges issued each month. She sends out the standard charge letters to the affected employees and receives their appeals and requests to appear before the RHC. She also sends form letters to witnesses requested by the RHC to provide written statements, or if deemed necessary by the RHC, appear in person before the RHC. If appellants request to appear in person before the RHC, she notifies them of the location, date and time of the RHC hearing (also referred to as "meeting"). If the referent does not make such request, she does not notify him or her of the RHC hearing schedule. Cone maintains all charge letters, appeals, witness statements and other evidence provided to or collected for the RHC in a file referred to as the RHC's "Referral Hall Book." Cone ultimately provides the book to the RHC for their meetings where the committee reviews the evidence and makes decisions to either sustain or dismiss charges. Cone explained that she includes and highlights in the charge letters the specific violation taken from the referral rules along with the appeal process provisions. (Tr. 168, 183, 186–187, 192, 196, 207–211, 213–214, 219).

Union President, Dagner, Cone and Hardter testified that the RHC has also maintained and enforced a longstanding, but unwritten policy that appellants are not permitted to receive or see any documentation relating to their charges unless and until they request to appear and appear in person. Then, they are allowed to view the evidence during the hearing.

According to Hardter, the Union's office (referral hall) has an automatic telephonic recording system, but only on the telephone lines in the call center for the stewards and in the front office where Cone and her assistant usually cover the phones. However, he testified that although his office is located within feet of Cone's desk, his line is not recorded because he normally does not interact directly with referents. (Tr. 124–126). He confirmed that calls are recorded contemporaneously with the conversation, and the recordings on those lines are date and time stamped and chronologically documented as such. (Tr. 131–134). As described in this decision, certain telephone conversations between both Charging Parties and either the front office (with Cone) or the call center were recorded. They have been admitted into the record on flash drive and also in transcription form.[3]

2. Background on Gentry's November 7 incident at work

Gentry, a union member and employee with Freeman since 2005, builds and deconstructs trade and exhibit show booths. While on a work site, signing out with other employees for a break on November 7, Gentry became upset apparently about a dues matter and used profanity. According to Gentry, in a telephone conversation with Cone on November 16, "I turned and looked at him [presumably the union's job steward, Eddie Kisosondi] and said - - I remember exactly what I said. I said this is messed up that you want me to pay for my dues and I can't even afford it because I can't work. I said this is really fucked up." (R. Exh. 8, p. 4). During a telephone conversation with Cone on November 16, Gentry claimed that she had "witnesses that say a whole bunch of people were going off that day [referring to November 7]." (R. Exh. 6 (e), pp. 3, 4). In a November 18 letter to Union Agent, Mark Hardter, Union President, Matthew Loeb and the NLRB, Gentry wrote that on November 16, Hardter told her that he talked to other people about the November 7 incident "who told him I had said F*ck Freeman, F*ck the union." (GC Exh. 8). Gentry did not deny that she became upset and used profanity on November 7, but rather believed that she had not been fairly treated or represented.

3. Gentry's request for information

On November 14 or 15, 2018, Gentry received a letter dated November 12 from Local 835's RHC charging her with violating referral hall rule Article VIII, Section 2, Subsection A-11, page 7 of 11 for "[c]onduct or behavior damaging to the Union's contractual relations with employers, or conduct or behavior that disrupt or obstruct the referral system or the Union's ability to carry out its duties and obligations." The letter also stated that floor steward Eddie Kisosondi charged and reported Gentry's alleged violation on November 7 "while on the IAAPA 18 on Wednesday, November 7th, 2018."[4] The RHC gave Gentry 14 days from the

[3] See R. Ex. 6 (a) (flash drive containing files of all conversations); R. Exhs. 6 (b) and 6 (c) (transcribed conversations between Lugo and Harmon); R. Exhs. 6 (d) (transcribed conversation between Gentry and call center employee "Karen"); and 6 (e) and 6 (f) (transcribed conversations between Gentry and Cone). (Tr. 129–132).

[4] I note that the referral hall rule quoted in the November 12 charge letter as Article VIII, Section 2,

date of the letter to submit a written appeal to the RHC by November 26 and instructed that she not contact her accuser in any way. (GC. Exh. 6). Gentry's charge letter did not contain the appeal sections set forth above at Article IX, Subsections 2 and 3, requiring that, "[t]he written appeal should indicate if the appellant wishes to appear in person before the Referral Committee," and that the RHC "will notify the appellant of the date, time and place of the hearing if the appellant has requested to appear at the hearing." Contrary to Cone's testimony that she included the appeals process provision in Gentry's charge letter, the provision was not included or referenced in Gentry's letter. (Tr. 209-210; R. Exh. 7).

Subsequently, Gentry learned from one of the call stewards that she would no longer be working on Freeman's shows. (R. Exh. 6 (d)). On November 16, Gentry called the union hall and asked Bonnie (Cone) why she had been suspended and if she could see what Kisosondi had "written up" on her. Cone responded that she "[could] request to appear at the referral hall," but could not see Kisosondi's report beforehand. (R. Exh. 6 (e)). Gentry insisted that the Union had treated her unfairly and that the "bylaws" required her to continue working. In response, Cone explained that Freeman's decision to suspend her was separate from the Union's charge against her. Gentry argued that the Union and not Freeman had suspended her. Cone corrected Gentry, telling her that Hardter received the notice of her suspension from, and talked to, Freeman the day before, but had been unable to change their mind.[5] Cone reiterated that Gentry "[could] request as [her] appeal to appear [to the referral hall] and state [her] side of the story." (Id.)

Gentry ended the call, but called back within minutes to argue her version of events that took place on November 7. Cone advised her "that's all part of your appeal process, Dawn. So there's nothing I can do at this point," and turned the call over to Hardter. (Id. at pp. 4–5). The calls between Gentry and Cone were recorded, but the conversation with Hardter was not.[6] (Tr. 85–89). Gentry questioned Hardter about how and why she was suspended when she had been permitted to work for Freeman on November 9 and 12 without receiving a warning. According to Gentry, Hardter said that no one had to give her any information. Hardter told Gentry about the 6-month suspension notice that he received from Freeman on November 15. Hardter also told Gentry how he "fought" for her, but believed that she should have received a 1-year suspension because "other people" had told him that she had referred to Freeman and the Union using profane language. Gentry testified that when she asked Hardter for the "paperwork" and her "grievance," he replied that he did not have to give her anything and that she would get her day in court.[7] He also told her that their call was being recorded, even though it was not. (Tr. 70–74).

Subsection A-11, Page 7 of 11 is actually that set forth in Subsection A-7, Page 7 of 11. Subsection A-11 states: "Abusive, threatening, obscene, or insulting language on the job to Local 835 office personnel or during Local 835 related activities." The latter is stated in the RHC's decision letter discussed later in the decision.

[5] Freeman suspended Gentry for 6 months for "[h]arassing or abusive language or behavior toward another person." (GC Exh. 13). The Union's charge against Gentry was for violating the referral hall's code of conduct. (GC Exh. 6).

[6] As previously stated, Hardter testified that telephone calls to his line were not recorded as were those to Cone's desk. (Tr. 85–89).

[7] There was no evidence that Gentry filed a grievance against Freeman.

Hardter explained that he took Gentry's call in his office, about 10 feet away from Cone's desk, because she had been yelling at Cone.[8] He acknowledged that Gentry was upset about her pending suspension and that he told her that she would have a chance to tell her story to the RHC. He confirmed that he shared his belief that her suspension by Freeman was "pretty fair because this is a terminable offense." He also testified that Gentry became very loud and used "some pretty colorful language" during the call, which led to his telling her that their call was being recorded (when it was not) to calm her and deescalate the situation. (Tr. 148–150, 154–155, 161–162). Hardter insisted that Gentry never asked him for any information, either from the Union or Freeman, during the call. (Id.) Cone, who claimed to have overheard Hardter's end of the call, testified that she did not hear him tell Gentry that she could not have any documents. (Tr. 222). Cone denied that Gentry asked her for documentation from Freeman[9]

By letter dated November 15, Freeman's labor control coordinator, Annel Bonner, wrote to Hardter that, "[o]n 11/7/18, Ms. Gentry's actions were disrespectful and insubordinate per the attached documentation and this behavior is unacceptable and will not be tolerated per Article 13.14.4," concerning "[h]arassing or abusive language or behavior toward another person." Bonner further stated that "[e]ffective immediately, Ms. Gentry is hereby suspended for six months and will not be reinstated until May 1st, 2019." Gentry was not one of the individuals copied on the letter nor did the letter list any of the witnesses to the November 7 incident. (GC Exh. 13 (the referenced attachments were not included in the exhibit or otherwise submitted)).

By letter to the Union's RHC dated November 18 and signed on November 19, Gentry appealed the Union's charge of misconduct, but she did not include a request to appear in person before the RHC. Instead, she questioned the timing of her suspension by Freeman, insisting that it violated the referral rule set forth in Addendum A, Section VII regarding suspension and removal and expressed that she did not understand the charges as she was not provided with any "warning, reprimands or notice of misbehavior or infractions." A review of the referral rule referenced by Gentry in her letter to the RHC pertains to the Union's suspensions and removals of individuals from the referral list, and not to employers' actions. It states that any person who commits a major or minor offense, "will be suspended ten (10) calendar days after receipt of written notice unless the person has filed a timely appeal," in which case, "no penalty shall be imposed until the appeal procedure has been completed." Gentry confused Freeman's suspension with the Union's charges, and was mistaken as to when the Union could suspend her as it did not do so until after the appeal process ended. (R. Exh. p. 5 of 11). She also stated that on November 16, Hardter denied her request for "a copy of the complaints against [her]."

[8] I credit his testimony as to why he took over the call from Gentry as Cone testified that Gentry "got very loud" when she called back, which led to Hardter taking over the call. There was no dispute that Gentry was very upset upon finding out that she could not work.

[9] The audio recording of Cone's conversation with Gentry confirms that Gentry only asked Cone if she could see what Kisosondi had written or reported; she did not request to see documentation that Freeman had sent to the Union. (R. Exh. 6 (e)). Despite listening to that audio recording, on the record, during the hearing, Gentry continued to insist that she also asked Cone for documentation from Freeman. She even interjected that everyone else in the room needed to listen to it again. I discredit Gentry's testimony in this regard.

She ended the letter by specifically asking for "a copy of any and all complaints regarding this matter." (GC Exh. 7).

On the same date, Gentry sent a letter addressed to Hardter, IATSE President Matthew Loeb and the NLRB. She complained of the Union's "failure to represent [her] and discrimination in recent charges levelled against [her]," and reiterated that she did not understand why she had not received any notice or warning of discipline. She related that Cone had advised her to "write the referral hall committee." She also described Hardter's November 16 refusal to comply with her request to "see the complaint from Freeman about [her] or the report from Br. Kisosondi who had been the steward on the IAAPA for the decorating." She did not, however, ask for these documents in this letter. (GC Exh. 8).

In a letter dated December 3, the RHC informed Gentry that it had met on November 29 and reviewed her appeal to charges that she violated Disciplinary Code Article VIII, Section 2, Subsection A-7 & 11, page 7. The RHC also notified her that it had denied her appeal and "imposed a 6 Month Suspension to take effect immediately… 11/29/2018 through 5/29/2019." (GC Exh. 15).[10] This internal suspension from the Union's referral hall was RHC's discipline of Gentry because of Gentry's conduct on November 7, and effectively precluded all of Gentry's employment opportunities through the Union for 6 months. I note that Gentry's suspension by Freeman, for the same November 7 conduct, commenced on November 15 through May 1, 2019. (GC Exh. 13).

The record also includes 11 letters, dated November 12, that the RHC (by Cone) sent to "named" witnesses to the November 7 incident resulting in the internal union charges brought against Gentry. The RHC requested in these letters that the witnesses provide written testimony by November 26, to be reviewed before the RHC at their next scheduled meeting to be held at the Local 835 business office. The witnesses were alerted that they might also be called to appear in person and if so, they still had to "provide [their] testimony in the form of a written statement." The RHC did not include any instructions to keep the letter, incident or written statements confidential. (GC Exh. 12(a)-(k)).

4. Additional testimony

Respondent's witnesses testified that Gentry had previously requested to appear before the RHC in other cases brought against her in the past. Specifically, Dagner testified that Gentry had appeared about 5–6 times in the past. Cone stated that union office documentation reflected that Gentry had requested to appear before the RHC in about 2005, before she (Cone) began working for the Union.

Cone and Dagner both explained the RHC's unwritten, long established policy prohibiting appellants from receiving or viewing information concerning their charges until their RHC hearing.[11] Cone, who had been with the Union since 2005, and Dagner, who had

[10] I note that in this December 3 letter, the RHC sited the violation to include both Subsections A-7 and 11 on pages 7 of 11, of Article VIII, Section 2.

[11] Dagner, as Local 835's president, appoints the members, but does not vote on the decisions to discipline (or not). He does attend the meetings and sees and/or hears all of the evidence presented from the RHC book and

been a member for 18 years, testified that this unwritten rule had been in effect when they began working with the Union and had been passed down by their predecessors. They also testified that Gentry had not received notification of the date, time and place of the hearing because she had not requested to appear before the RHC as required by the referral hall rules. (R. Exh. 7, Article IX. Appeals, p. 8 of 11). The rules are silent, however, as to if and when an appellant has the right to review information pertaining to the reported infraction.

Dagner testified that he interpreted Gentry's request for a copy of any and all complaints regarding this matter as her "[wanting] the witness statements or any other information pertaining to her case." He reiterated that had she requested to appear in person, she would have had access to that information. (Tr. 188–189). He stated that the RHC policy precludes appellants from reviewing "anything that's in their file until they're at the meeting" because "[p]eople would get witness statements and find out who they were. Then they would bully them or they would attack them on the floor" to "see if they would rip up their witness statement, so they would have a clean case." However, when asked if the RHC's intent was to keep witness' names confidential, he responded with some hesitancy that it was "[m]oreso the witness statements." On redirect, Dagner insisted that he tells witnesses who appear at the RHC meetings that they are confidential and "[n]ot to discuss anything on the floor with anybody." However, he acknowledged that the letters sent to potential witnesses in Gentry's case did not instruct them to keep their statements or other information about the case confidential. Therefore, witnesses were free to discuss and disclose their statements with anyone prior to the RHC meeting. (Tr. 199–202; G Exh. 12(a)-(k)). Finally, Dagner did not provide any testimony that Cone or potential witnesses informed him or the RHC that they were concerned about witness intimidation.(Tr. 211–212).[12] In addition, he did not offer to provide Gentry with any information that may not have been deemed confidential, nor did he offer to redact the names of witnesses and provide redacted statements. (Tr. 197–199).

Although employees challenging union charges did not have access to information prior to the RHC hearings, Cone admitted that they did have access to their employers' suspension notices sent to the Union and maintained in their personnel files. (Tr. 223–224).

by live witnesses, if any.

[12] I sustained the General Counsel's hearsay objection to Respondent's counsel's question to Cone about whether she recalled if any of the witnesses in Gentry's case had expressed concern about witness intimidation or retaliation from Gentry, but permitted an offer of proof from Respondent's counsel as to what Cone would have said. If I had overruled the objection, I would have discredited Cone's testimony given that Dagner did not mention or indicate that he had received any complaints that a witness had expressed concern or fear of witness tampering or retaliation from Gentry. (Tr. 211-212).

5. Additional credibility determinations[13]

Although Gentry's testimony was fairly consistent with what she wrote in her November 18 appeal and letter to Hardter, Loeb and the NLRB, she omitted that Cone advised her in their November 16 conversation that she could ask to appear before the RHC to present her case.[14] At one point, she even testified that she made such a request despite evidence (her appeal letter) to the contrary. When asked when and where she made the request, she did not respond. Similarly, Gentry argued that she had asked Cone for Freeman's complaints against her after listening to the audio recording of their conversation which reflected that she did not.[15]

Despite those and other inconsistencies (discussed below), I credit Gentry's testimony that Hardter denied her request for copies of the complaints against her during their telephone conversation on November 16. Within 2 days of this discussion, Gentry described her request in both her appeal letter to the RHC and her letter to Hardter, Loeb and the NLRB. (Tr. 73–74; GC Exhs. 7–8). Further, there is no evidence that Gentry received a suspension notice from Freeman prior to her conversation with Hardter. In fact, the audio recording transcript reveals that Gentry expressed disbelief when Cone advised that she had been taken off work by Freeman and not the Union. Cone testified that the employer's disciplinary notices normally indicate that referents had been copied on them, but Freeman's letter to Hardter did not list Gentry as a recipient. (GC Exh. 13). Thus, it is unbelievable that after learning that Hardter received Freeman's notice of her suspension the day before, that she would not have requested to see the Freeman's complaint against her. Further, I do not, as Respondent suggests, discredit Gentry's testimony because she, at various times, referred to the information that she requested as her "grievance," her "paperwork," and "any type of write-ups or complaints." Therefore, the evidence, including Gentry's written communications and Respondent's unwritten policy, supports her testimony that Harder refused her request for the complaints by Freeman and the Union.

Based on my credibility findings, I also give little weight to Respondent's witnesses' testimony that they did not perceive Gentry's letters to include an information request, but mere complaints or venting. Gentry requested information from Hardter, and both Dagner and Cone

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[13] I have based my credibility findings on multiple factors, including, but not limited to, the consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; the witness' demeanor while testifying; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. *Daikichi Sushi*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). As such, credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony. *Daikichi Sushi,* supra at 622.

[14] The transcript (and recording) of Gentry's telephone conversation with Cone on November 16 confirms that Cone advised Gentry that she could "request to appear at the referral hall" and that she could "request as [her] appeal to appear there and…state [her] side of the story." (GC Exh. 6(e), p. 3).

[15] For example, when Respondent's counsel asked her about requesting a copy of Kisosondi's write-up from Cone, she asserted that, she "asked them for the Freeman one. You need to rehear it (referencing the recording)." (Tr. 91–92, 93).

admitted that they read Gentry's appeal request for "a copy of any and all complaints regarding" the charges against her. Dagner had no explanation for not responding to Gentry's request other than it was made prior to the RHC hearing.

On the other hand, I discredit Gentry's testimony that she had no idea that she needed to request to appear before the RHC to present and review evidence in support of her case. In addition to the above described inconsistencies, Gentry contradicted herself when asked if she had previously asked to appear before the RHC. Initially, she testified that she only had one prior case before the RHC in 2005. However, she later admitted that there were other instances where she went before the RHC, but claimed not to recall the number of times. For example, she testified that she had been "wrote [sic] up in 2004…and didn't know anything about writing people up or what you have to do to get there or anything like that." She also claimed that, "I was not found guilty, so let's really get that on the record that --." (Tr. 96–99, 100–101). She next testified that she had only appealed once and that "somebody helped [her] in the office write the letter." She could not recall who assisted her, but said that others sent in testimony regarding that situation and that it never made it before the RHC. Then, she testified that there may have been "one other time," when she attended an RHC meeting, and that it was about a "phone call on the floor," in a 2017 incident with someone named Margret, where she was found to be innocent. She testified that she did not remember the exact date because "if I were found guilty, I would remember. But I was found innocent, so I don't remember." Gentry stated in that instance, she filed an appeal but received a letter telling her not to "show up." (Tr. 105–107). Given these inconsistent, evasive and confusing responses from Gentry regarding her past experience with the RHC appeal process, along with Cone's advice that she request to appear before the RHC, I find that Gentry was aware or should have been aware of the requirement to request in her appeal to attend the RHC hearing.[16]

6. Analysis

The only issue regarding Gentry is whether Respondent breached its duty of fair representation under the Act when it refused her request to provide her with information the Union had regarding the charges against her. I also find that the RHC is part of the Respondent Union; therefore, I will determine whether the Union (by either Hardter, the RHC or other Union representatives) violated the Act by failing to provide Gentry with the requested information.

The duty of fair representation refers to the Union's "statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). This duty applies to all union activity. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991); *In Re United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied*

[16] In addition, Gentry's conduct and demeanor throughout most of the hearing was somewhat disruptive and argumentative. She refused to follow numerous instructions to respond to the questions asked by both counsel and interrupted others' testimony. She even instructed that I object to one of Respondent's counsel's questions or comments. (e.g., Tr. 96–99, 153).

Indus. & Serv. Workers Int'l Union, AFL–CIO, 357 NLRB 516, 534 (2011). Thus, union activity may include an obligation to provide employees with requested information regarding their grievances and other terms and conditions of employment when there is no rational explanation for the failure to provide the information. *Branch 529, Nat'l Ass 'n of Letter Carriers,* 319 NLRB 879, 880–881 (1995). However, a breach of this duty of fair representation "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190; see also *Air Line Pilots Ass'n, Int'l v. O'Neill*, above.

The Board examines the totality of the circumstances in evaluating whether a union's grievance processing is arbitrary. See *Office Employees Local 2*, 268 NLRB 1353, 1354–1356 (1984). Discrimination encompasses racial and gender discrimination as well as other distinctions made among workers, including lack of union membership. *Breininger v. Sheet Metal Workers Int'l*, 493 U.S. 67, 78 (1989). In *O'Neill*, above at 81, the Supreme Court clarified that the duty of fair representation bars only "invidious" discrimination. The Supreme Court further established that such discrimination requires "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 301 (1971). Next, a bad faith violation "requires a showing of fraud, or deceitful or dishonest action." *Int'l Union of Electronic, Electrical, Salaried, Mach. & Furniture Workers v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 531 (10th Cir. 1992). Finally, union actions are arbitrary "only if [the union's conduct] can be fairly characterized as so far outside a "wide range of reasonableness, that it is wholly irrational" *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)) or "without…explanation." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44, 45–46 (1988). For the most part, a showing of deliberate conduct is required on the part of the Union. Therefore, mere mistakes or errors in the course of processing grievances or engaging with members do not constitute a breach of duty or violation of the Act.

Respondent argues that there is "'no general affirmative duty [for a union] to provide [a bargaining unit member] relevant requested documents upon request,'" quoting *Int'l Union of Operating Engineers Local 18 (Precision Pipeline, LLC)*, 362 NLRB 1438, 1446 (2015). I agree, but Respondent acknowledges that the tripartite standard set forth above applies. Unions may be liable for refusing an employee's request for information that can impact the employment relationship, where the refusal is arbitrary, discriminatory or made in bad faith.

I have found that credited evidence shows that Gentry requested to see the Union's/Kisosondi's charges against her from Cone and Hardter and Freeman's and the Union's charges and/or complaints from Hardter and from the RHC (in her appeal, "a copy of any and all complaints regarding this matter.") In addition, Gentry contemporaneously made her request known to the RHC and to the IATSE President, Matthew Loeb, and Hardter in her November 18 letters. (GC Exh. 7–8). As stated, Dagner admitted that he interpreted Gentry's request for a copy of any and all complaints regarding this matter as her "[wanting] the witness statements or any other information pertaining to her case." (Tr. 188–189). Further, Cone maintained Gentry's appeal letter in the RHC book until it was provided to the RHC for its hearing.

Therefore, I find that the Union was well aware of Gentry's request for information about the charges against her.

On the other hand, I have found that Gentry knew or should have known to request to appear before the RHC. This is particularly so since Cone advised her twice prior to the submission of her appeal that she should ask to appear before the RHC to present her version of the November 7 incident and review evidence against her. Gentry did not do so, but instead repeated her request for copies of all complaints lodged against her. Therefore, pursuant to the Union's referral hall rules, she did not receive notification of the RHC hearing.

Notwithstanding the Union's referral hall rules requiring a written request to appear before the RHC and the Union's unofficial policy preventing access to information prior to the RHC hearing, there is still the question of whether under the Act, the Union had a duty of fair representation to provide Gentry with the requested information. In other words, was the Union's refusal arbitrary, discriminatory or made in bad faith.

First, there is no evidence that the refusal to provide requested information was discriminatory or that the Union treated Gentry differently from other RHC appellants. Cone testified without contradiction that no other appellants or referents had requested information regarding RHC charges. Nor do I find evidence to support a finding that the Union acted fraudulently or in bad faith in its enforcement of its referral hall rule and unwritten document confidentiality policy.

However, in considering the totality of the circumstances, I find that the Union's actions regarding Gentry's requests for information were arbitrary, and therefore, a violation of the duty of fair representation. The rationale offered for the rule against producing documents to employees is not rational or reasoned.

Although Respondent's witnesses testified that Gentry would not have been entitled to any information received in connection with her RHC charges, Cone admitted that Gentry, and other employees, would have been entitled to Freeman's disciplinary notification as it normally would have gone into their personnel files. (Tr. 223–224). Gentry clearly complained in her appeal letter and group letter to Hardter, Loeb and the NLRB about Hardter not providing her with "the complaint from Freeman about [her] or the report from Br. Kisosondi who had been the steward on IAAPA for the decorating." Nonetheless, the Union did not provide these documents from Freeman to Gentry, and the Union has offered no explanation as to why it did not. At the very least, the Union should have furnished her with the suspension notice that Freeman sent to Hardter on November 15 as it did not involve the Union's charged violation or names of witnesses.

Moreover, I find Respondent's alleged confidentiality interest in protecting witness statements is substantially diminished by the fact that RHC standard letters to witnesses do not contain an instruction or warning to keep witness statements confidential and not discuss them or the cases with anyone. This is especially so when the letters indicate that the written witness statements may be sufficient in lieu of witnesses appearing before the RHC. Apparently, under the Union's application of its policy, pre-hearing confidentiality is only for the union member

being brought up on charges, but does not apply to anyone else. This is irrational and no effort to justify it was made by the Union. It defies reason that witnesses who appear before the RHC are told the proceedings are confidential and "[n]ot to discuss anything on the floor with anybody," but have free reign to share or discuss their statements with anyone prior to (or even if they do not attend) the hearings. (Tr. 199–202; GC Exh. 12(a)-(k)).

I find that Respondent's failed and conflicting reasons for its unwritten policy precluding appellants from seeing any and all documentation in connection with the charges leveled against them, and failure in this case to provide an offer of accommodation were arbitrary and beyond the realm of reasonableness, and therefore, a violation of the Union's duty of fair representation. (Tr. 197–199).

7. Respondent's defenses

It is true that the Board must show a union deference when determining what conduct is reasonable to ensure the effective performance of its representative function and will not substitute its judgement for the union's in determining what is reasonable. *In re Int'l Alliance of Theatrical Stage Employees,* 364 NLRB No. 89, slip op. at 5 (2016), citing United Brotherhood of Painters, Decorations & Paperhangers of America, Local Union No. 487, 226 NLRB 299, 301 (1976). However, I disagree with Respondent's argument that Local 835's RHC inspection of documents rule is comparable to that of other union rules found to be non-arbitrary by the Board. Respondent cited *Int'l Union of Operating Engineers Local 18 (Precision Pipeline, LLC)*, 362 NLRB 1438, 1446 (2015), to support the argument that it lawfully refused to furnish Gentry with any information pertaining to the charges against her. To the contrary, *Int'l Union of Operating Engineers Local 18* is inapplicable as the Board found that a union's consistent policy reason for refusing to provide pre-job report information about its competitive bidding process to a member was rational and not arbitrary. The Board in that case distinguished the request and rejection in its case from that in *Branch 529, Letter Carriers*, 319 NLRB 879, 880–881 (1995), where a union breached its duty of fair representation by refusing to provide an employee with copies of a grievance filed on her behalf. The Board recognized the *Branch 529* employee's "'self-evident"' and "'particular"' interest in acquiring forms related to her own grievance as well as the union's wholly irrational explanation that the forms belonged to the union. It also understood that the international union's refusal to provide members with grievance forms without any reason or "substantial countervailing interest" was automatically arbitrary since "[a]rbitrary means no reason," and "[n]onarbitrary policies have reasons." *Int'l Union of Operating Engineers Local 18*, above at 1447.[17] In this context, the Board found in its own case that the requested job reports were unrelated to any employee's grievance, and that employees failed to otherwise show "any explicable reason" for the request. Id. The evidence in Gentry's case does not establish a disconnect between Gentry's interests or charges and her request. Nor does it show that Respondent had a credible interest in its refusal to provide all of the requested information.

[17] In *Branch 59*, the union basically claimed the forms as their property which they just did not provide to its members. *Int'l Union of Operating Engineers Local 18*, above at 1447.

Respondent's reliance on the Board's decision in *Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union, Local 226*, 363 NLRB No. 33 (2015), is also misplaced. In that case, the Board found lawful and reasonable the union's rule precluding members from receiving by telephone their personal anniversary date information necessary to withdraw from the union. The union did, however, offer accommodation by permitting members to retrieve that information in person. Similarly, the decision in *Int'l Union of Operating Engineers Local 181 (Maxim Crane Works)*, 365 NLRB No. 6 (2017) does not support Respondent's position, in that the Board found reasonable, and not unlawful, the union's requirement that its member schedule an appointment in advance and then travel to an office not as conveniently located to that member. In another case, the Board found that the union violated the Act by not only refusing to provide an employee with copies of a labor agreement and welfare plan, but by failing to give a reason for not doing so. See *Law Enforcement & Security Officers, Local 40B*, 260 NLRB 419 (1982). Therefore, the Board has examined the rationale of the union, or lack thereof, as well as the reason for the request in determining whether a union violates the Act.

A union's investigative arm may have a significant interest or reason for not furnishing appellants with evidence or witness statements, but in this case, Respondent does not. As in *International Union of Operating Engineers Local 18*, above, Gentry's interest in acquiring information regarding the complaints lodged against her by the Union and by Freeman is "self-evident," and not outweighed by the Union's incredible and contradictory confidentiality interest. Respondent would argue that Gentry rejected what constituted its accommodation offer by failing to request to appear before the RHC where she would have been permitted to view all documents associated with her case. However, I find it insufficient here for the reasons stated above. There is no rational reason, under the circumstances in this case, that Gentry could not have had at least some requested documents in advance of the hearing. As noted, no such limitations were placed on witnesses. Moreover, Hardter in particular acted arbitrarily by refusing to share Freeman's suspension notice with Gentry after she specifically requested it by telephone and in writing. There was absolutely no reason why this information was withheld. Freeman's notice did not include any witness names or other confidential information that would have reasonably jeopardized witness testimony or other evidence in the RHC's charge against Gentry.

Finally, the Union did not offer Gentry an alternative or accommodation such as providing her with the information after the RHC's decision or offering Gentry documents redacted of any potentially confidential information. Thus, to the extent this "confidentiality" rationale for failing to provide requested documents could ever be a reasonable rule as to certain portions or types of documents, the Union's overbroad application of it is not supported by any rational explanation. Indeed, as discussed above, the Union even applied it to deny Gentry documents from Freeman that the Union agrees she should be able to have.

Respondent's argument that Cone, Dagner, and the RHC reasonably interpreted Gentry's letter to the RHC as primarily an appeal, and not as a stand-alone records request, is without merit since Gentry's appeal letter clearly requested information about the charges against her. Similarly, I reject Respondent's argument that since Gentry never followed up with anyone to let them know she was still requesting records, independent of her appeal, that she somehow waived her right to them. There is no requirement generally that a member seeking

information need reinstate his or her request. In addition, I dismiss Respondent's last contention that at the Union's misinterpretation of Gentry's November 18 request was mistaken, and not arbitrary. There is no evidence whatsoever of a mistaken interpretation.

In conclusion, I find that Respondent violated the Act when it refused to provide Gentry with reasonably requested information regarding the Union's charges and complaints against her, including the suspension by Freeman, in its possession and presented to the RHC.

C. Charging Party Luis Lugo

1. Lugo's position with GES

Luis Lugo worked as the only lead carpet worker for GES from 2005 until he was terminated in late August 2018, effective on August 25, for taking company property without permission for personal commercial use.[18] Unlike the other carpet workers, he occupied an office with air conditioning and a telephone while employed at GES. Lugo testified that he "ran the carpet department," receiving print outs of carpet orders, deciding how to most efficiently fill them and instructing the other workers how to do so. (Tr. 17–18, 38). When asked who dealt with workers who did not show up for work or do their jobs, Lugo responded that, "[o]verall, I'm responsible to getting the job completed." He explained that "if they show up or don't show up, I still have to move on with the work and complete the job." (Tr. 35–36). Although he reported any rule violations or misconduct to warehouse management if he witnessed them, he did not discipline anyone. Nor did he discuss disciplinary options with management. For example, if he reported it to the warehouse manager, "he would listen to [him] and then he would investigate it."[19] (Tr. 36–38).

2. Lugo's information requests

Lugo contended that after his termination, he requested that the Union file a grievance on his behalf and on several occasions, verbally asked for a copy of it. Lugo testified that Hardter notified him by telephone on August 27 that GES had suspended him pending an investigation. After telling Hardter that he "knew this was coming," Lugo told him that he wanted to file a grievance and get a copy of it. Hardter replied that he was "already on it." (Tr. 19). Lugo claimed to have made another verbal request for a copy of his grievance in either late August or early September, to which Hardter responded that "he's on it and that we needed to meet to go to GES for a statement" and that "[i]t just takes time, the steps that he has to take." He asserted that he next requested his grievance in person during the same time period, right after his investigative interview at GES. He insisted that Hardter responded once again that he was "on it," and that "[i]t takes step by step." (Tr. 20–22). There were no witnesses to these conversations with Hardter, despite the fact that Union President Dagner also attended and represented Lugo during the interview.

[18] Lugo maintained a side business called Marvelous Merchandise, selling various merchandise. (Tr. 35).

[19] I credit Lugo's testimony regarding his actual duties and responsibilities as the lead carpet worker, as Respondent did not produce any witnesses or other evidence to the contrary.

Although Lugo's Board affidavit reflects that the investigative interview occurred on either September 13 or 20, documentary evidence shows that it must have occurred on about August 30, prior to GES' decision to terminate him. (Tr. 39, 40–41). In a September 12 letter from GES, General Manager, Arthur Keith, informed Hardter that GES terminated Lugo after a "thorough investigation" of the charges against him. Included in the attachments was an email dated August 29 from Keith to Andrea Neal, GES' human resources business partner, advising that they had yet to conduct Lugo's investigative interview, but "anticipate this meeting will happen tomorrow." Additional attached emails reflect that GES conducted its investigation between August 27 and August 30. (GC Exhs. 3–4; R. Exh. 7). In an October 3 email to Hardter, set forth below, Lugo wrote that he was terminated on August 25, but did not request that Hardter file a grievance until a telephone conversation with him on September 4. Therefore, GES terminated Lugo between August 30, the date of the investigative interview, and Lugo's September 4 email to Hardter, and Lugo's first verbal request for a copy of his grievance would have been on September 4. There was no dispute that Lugo's termination was retroactive to August 25.

The record also indicates that Keith's September 12 letter was prompted by Hardter's September 10 letter to Keith informing him that the Union believed that Lugo's termination was not justified and that the Union had begun its own investigation. Hardter also advised that the Union was advancing Lugo's grievance to step two of the procedure as outlined in the CBA. (GC Exh. 5; R. Exh. 7). Next, by letter dated September 27, Hardter moved Lugo's grievance to step 3:

> The Union has received GES's investigation and findings on the termination of Luis F. Lugo. The Union has not yet received a statement and or evidence from Mr. Lugo and cannot conclude its investigation until we gather his statement.
>
> Due to the timeline in our grievance procedure of our Collective Bargaining Agreement, we advance this grievance to Step Three (3) to keep our timeline intact. Following the conclusion of our investigation, we will contact the company and proceed from there.
>
> If needed the Union will, in the near future, contact the company and set-up a mutually agreed upon time and place to have a Step Three (3) meeting with the International Representative as outlined in the grievance procedure. [sic]
>
> (R. Exh. 8).

In an October 2 text message, Lugo sent his first written request for a copy of his grievance to Hardter:

> Good morning mark I tried reaching out to you Several times and left several messages and you have not return my phone call I'm calling you because I need a copy of my grievance and a copy of the statement of just cause from Ges leading them to my termination I have my statement which I'm turning in this week but I want a copy of my grievance and the statement from GES leading

> them to my termination. Also you mention I have a deadline turning in my statement I asked you what's the deadline date and all I get from you is it's soon if there is a deadline I would like to know the deadline date. [sic]

(GC Exh. 2; Tr. 24–25)[20] In his October 3 email to Harder, Lugo also asked for a copy of his grievance:

> I was terminated on 08/25/2018, and via telephone on September 4th I stated I wanted to file a grievance. You responded to me that you already have done so for wrongful termination which I have not received any follow up information on. I have also requested a copy of my grievance and any statements against me from GES leading to my termination and I have not received any documentation from you Mark. I also called your cell phone left voice messages along with a text message but still have not received any responses.
>
> You have requested that I submit a statement and that there is a deadline, I have asked repeatedly for a deadline date and every response has been deadline is coming up soon which is not a fair answer. I have also called Kevin Harmon at the union office and asked him to reach out to you (Mark Hardter) for a deadline date for my statement and your response to Kevin was also deadline date is coming up soon.
>
> Mark I am asking that you reply with a deadline date within 24hours.
>
> Also if you can update me on the status of my grievance for wrongful termination.
>
> I appreciate your immediate response [sic]

(GC Exh. 3).

Lugo testified that Hardter did not respond to his text message; however, Hardter responded to his written inquiries on October 4, within 24 hours as requested in his email, as follows:

> Luis your grievance is in step three of the grievance procedure. I have documented Investigation and charges from GES. I now need to conclude the unions Internal Investigation to determine if there is significant evidence to push this grievance further. Please call the front office and schedule an appointment with Bonnie to produce any emails witness statements, your statement or any other proof you have to dispute these charges. There is no deadline however I need to gather proof if I am to proceed further with this grievance.

(Id.)

[20] This text messaging is fragmented in the exhibits, but this reflects the entire October 2 message.

Lugo met with Hardter in his union office on October 8. He testified that upon entering the office, he told Bonnie Cone that he was "there to drop this document off for Mark [Hardter]."[21] Lugo asked Hardter for any evidence from GES regarding his "wrongful termination," in addition to a copy of the grievance filed on his behalf. He said that Hardter replied that, "It's in procedure. It's in steps. He's on it." (Tr. 27–28). In further response, Hardter provided him with a file or packet of information which he briefly looked through in Hardter's office. The packet contained witness statements and emails from GES, but according to Lugo, did not include a copy of his grievance. Afterwards, Lugo never informed Hardter that the file did not contain a copy of his grievance. (146–147, 160).

According to Lugo, he asked Hardter for a copy of his grievance, one last time, when he ran into him at the convention center the next day, stating that he "]j]ust asked him what's going on with my grievance, what does he think, what's the outcome, and I would like a copy of my grievance." (Tr. 31).[22] He said that Hardter responded once again that, "[h]e's on it and working it out, and it just takes steps." He did not say that he told Hardter that his grievance was missing from the information that he received the day before. (Tr. 29, 31-32, 53-56).

Lugo testified that after October 9, he never again asked Hardter for a copy of his grievance. He insisted that he was "just tired of asking, where is the copy of my grievance? So now I'm saying, what's the status of my grievance." (Tr. 56–57; R. Exhs. 1–2). In fact, he sent Hardter four additional text messages and an email asking about the status of his grievance, but not for any documentation. In his November 3 text, he asked if Hardter had read his statement and for the status of his grievance. Hardter responded on November 6 that he was scheduled to talk to Keith on Thursday and would keep him informed. Lugo thanked him and said he looked forward to hearing from him on Thursday. In the next communication, on November 19, Lugo asked about updates on his grievance. Hardter promptly responded that he was waiting for the next step meeting and would keep him informed. This text message stream ended on November 27 with Lugo asking Hardter to call him when he got a chance.[23] (R. Exh. 1). In his December 20 email to Hardter, Lugo asked about the status of his grievance, but mostly questioned Hardter about when he would be able to retrieve his personal belongings from GES. (R. Exh. 2). Hardter's response to Lugo's email on December 26 stated:

> Louis I have been very busy with Contract Negotiations, Holiday Party, and oh yeah the other 2000 people whom I represent. After negotiations on the night of our Holiday Party We (the International and GES top management) met to discuss this grievance. We were unable to settle and the grievance has been advanced to Arbitration. This means that their attorneys and the Unions attorneys contact each other and begin the process of selecting an arbitrator. This

[21] Hardter and Cone testified that Lugo did not leave any documents or his written statement on October 8. In addition, Lugo's October 3 and November 3 emails indicate that he had not submitted his statement until late October or early November. (Tr. 146–147; R. Exh. 1, p. 3).

[22] Lugo's testimony about this conversation is questionable as he had just discussed the status of his grievance and received GES' evidence against him the day before, and during the alleged October 9 meeting, he did not mention to Hardter that the packet did not contain a copy of his grievance.

[23] There is no evidence that Hardter called him.

> is where we're at. I inquired about your personal belongings and management knew nothing about them but said they would look into it, I have not gotten a response yet on their search. [Are] there any other questions? E-mail them to me. Else I will contact you when the panel has been drawn and agreed upon, then our attorneys will have us in their office to draw up a game plan. Hope you had a nice Christmas and a Happy New Year.

(Id.) It is undisputed that Hardter progressed Lugo's grievance to the arbitration stage where it was still pending at the time of the hearing. (Tr. 147; R. Exh. 2).

Lugo could not recall how many times he called Hardter to request a copy of his grievance, only that he had called and left messages prior to his October 2 text message. He also asserted that at some point, he called the union office and asked his friend and lead call steward, Kevin Harmon, to talk to Hardter. When asked if he specifically asked Harmon for a copy, he responded, "[o]ff the record, yes," explaining that he "never called him and I called the - - I spoke with Kevin in person and told him that I'm trying to get in touch with Mark, and the reason why I'm trying to get in touch with Mark." He then testified that he talked to Harmon on the telephone and in person. (Tr. 49–50; 52–54).[24] The consolidated complaint only alleged that the Union failed to respond to Lugo's oral request for his grievance on September 4 and his written request on October 3. (GC Exh. 1(m)).[25] In an October 3 email to Hardter, Lugo stated that he had "called Kevin Harmon at the union office and asked him to reach out to you (Mark Hardter) for a deadline date for my statement and your response to Kevin was also [a] deadline date is coming up soon." He did not mention that he asked Harmon about a copy of his grievance. (Tr. 50–52; GC Exh. 3). Further, Harmon did not recall if Lugo or Hardter told him (at some undetermined time) that Lugo wanted a copy of his grievance. (Tr. 176–178). Therefore, I discount Lugo's testimony that he asked Harmon for a copy of his grievance or requested that he (Harmon) ask Hardter for a copy of it.

3. Hardter's version of events leading to Lugo's information request

According to Hardter, although the CBA required the step 1 grievance to be filed in writing by the complaining party, at Lugo's request he represented him and verbally initiated the process with GES.[26] Hardter did not recall when Lugo first asked him for a copy of his grievance, stating that, "I don't recall until, I mean, the obvious text message, but as I think that was - - when was my - - we determined it was about the same day that they issued the termination letter was the day that I started the grievance, so that put him into 1 pending…Once they fired him, I initiated the grievance procedure. I believe it was the 10th of August." Tr. 143–144. Hardter maintained that he "[believed]" that the grievance documents were included

[24] Recorded telephone conversations between Lugo and Harmon that occurred on September 4 and October 29 reveal that Lugo asked Harmon about retrieving his personal belongings from GES, and other matters, but not that Lugo asked about or mentioned his grievance. (R. Exh. 6(b)).

[25] Similarly, Lugo's amended charge also claimed that the Union had failed to provide him with a copy of his grievance since "on or about early September 2018." (GC Exhs. 1(g)-(h)).

[26] Hardter testified that since the incident involving Lugo occurred outside of a work site, without an onsite job steward, he and Union President Dagner agreed to represent Lugo (at Lugo's request). Both Hardter and Dagner represented Lugo during the investigative interview. (Tr. 139-142).

in the packet that Cone copied and provided to Lugo on October 8. He explained that he "generally [kept]" all related documentation, including copies of the grievance letters, in "a folder in a briefcase that [he carries] with [him] so that [he] can reference them at any spot, place [he goes]." (Tr. 144–146). He denied that Lugo requested a copy of his grievance after October 8, but also initially testified that Lugo did not make any requests on October 8. (Id.)

Article 12 of the CBA (grievance procedure) between the Union and GES does not require that step 1 of the process be initiated in writing. Instead, it only states that the complaining party must bring the grievance or dispute to the attention of the job steward (or other designated union representative) who will then attempt to settle the controversy with the production supervisor. The supervisor in turn must give the steward an oral reply within 3 calendar days, after which the steward has 2 calendar days to report the company's findings to the grievant and union. If the matter is not resolved at step 1, then the grievant must file a signed written grievance with the union within 5 calendar days. If the Union decides that the case has merit, it should then file that grievance with the general manager within 10 days, thus moving the grievance to step 2 and so on if it is not resolved. R. Exh. 6, Article 12 (Grievance Procedure, page 13). I credit Hardter's testimony that he verbally initiated the grievance on the day the employer notified him that Lugo had been terminated, and consequently find that he must have done so after August 30 but before his September 10 letter moving the grievance to step two. (GC Exh. 5, R. Exh. 7).

Although Hardter orally informed Lugo of the status of his grievance on several occasions between September 4 and December 26, he never provided him copies of the letters to Keith advancing his grievance through the various stages. There is also no evidence that he kept Lugo apprised of the details of his grievance as he advanced it through the process.

4. Additional credibility findings

I have determined based on the record that Lugo first asked Hardter for a copy of his grievance on September 4. This was the same date that Hardter informed him that he had been terminated and that he had already initiated a grievance on his behalf. Hardter did not deny that Lugo asked him for a copy of the grievance on that day, and Lugo's October 3 email to Hardter, corroborates evidence that this was the date that he orally requested his grievance. I also find based on his October 2–3 text messages and email, that he more likely than not attempted to contact Hardter by telephone and left messages to no avail. In fact, Hardter acknowledged that Lugo had left him messages. Given the nature of the October 2 text messages and subsequent October 3 email, I credit Lugo's testimony that he orally requested a copy of his grievance after September 4, but only by telephone messages in the few days leading up to the October 2 and 3 communications.[27] (GC Exhs. 2–3). As previously stated, Lugo did not recall when and how often he orally requested a copy of his grievance prior to his written requests.

[27] The complaint and underlying charges in this case allege only one verbal request for his grievance on September 4; thus, I do not believe that Lugo made other such requests on numerous occasions between September 4 and the few days leading up to his October 2 text message to Hardter.

In summary, Harder did not initiate Lugo's grievance in writing; therefore, the only written evidence of his grievance included Hardter's September 10 and 27 letters to Keith advancing it to Steps 2 and 3. Hardter did not, however, keep Lugo informed about the details of the grievance process (only that it had to go through the "steps"). Nor did he provide him with copies of those letters. Although I do not credit Lugo's testimony that he requested a copy of his grievance numerous times before October 2, the evidence supports his oral request on September 4, and more likely than not, additional ones made by voice messages in the few days before October 2. Regarding the grievance letters being left out of the information packet that Hardter furnished on October 8, I credit Harter's testimony that he did not intentionally exclude them. However, Hardter made no effort to ensure that they were included or to otherwise share with Lugo the contents of the letters or the details regarding the status of the grievance. At the same time, I discredit his testimony that Lugo made no requests at all while in his office on October 8, for that is the very reason that Lugo went there. It is unbelievable that Lugo would not have reinstated his request for the grievance and information from GES or that he would not have at least repeated his request for the status of his case.

5. Analysis

a. Lugo is an employee under the Act

Respondent argues that the complaint regarding Lugo should be dismissed because by his own testimony, he was not an employee but rather a supervisor pursuant to 29 U.S.C. § 152(11). (R. Br. 12-13). Respondent contends that based on Lugo's testimony, as a lead carpet worker, he had the authority and used independent judgment to assign work and discipline the employees, or at least to recommend discipline to his superiors. For example, Respondent cited to Lugo's testimony that he "ran" GES' carpet department, directed employees, received orders and used his independent judgment to determine how to fill the orders most efficiently. However, I find the evidence does not support a finding that Lugo worked in a supervisory capacity for GES. Moreover, there is no evidence that Local 835 at any time considered Lugo to be a supervisor for GES. Instead, the Union represented Lugo as a referent employee and filed and processed his grievance over this termination.[28]

b. Respondent breached its duty of fair representation under the Act

The only issue regarding Lugo is whether Respondent breached its duty of fair representation under the act when Hardter failed to provide him with a copy of his grievance. As previously stated, the duty of fair representation refers to the Union's "statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Thus, union activity may include an obligation to provide employees with requested information regarding their grievances and

[28] Hardter attempted to testify over sustained objection that he heard that Lugo was performing certain duties, but as the Union's business agent, he had no direct knowledge of Lugo's duties. In support of this argument, Respondent cited *Beasley v. Food Fair of N. Carolina, Inc.*, 416 U.S. 653, 656 (1974); *NLRB v. Yeshiva University*, 444 U.S. 672, 680 (1980); however, unlike the employees in those cases, Lugo did not meet the standard for determining that he was a supervisor and thus undeserving of protection under the Act.

other terms and conditions of employment. *Branch 529, Nat'l Ass 'n of Letter Carriers,* 319 NLRB 879, 880–881 (1995). However, a breach of this duty of fair representation "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190; see also *Air Line Pilots Ass'n, Int'l v. O'Neill*, above.

As with Gentry, I will examine the totality of the circumstances in evaluating whether Respondent's failure to furnish Lugo with a copy of his grievance was arbitrary, discriminatory or made in bad faith. I find that Lugo had a right under the Act to request and receive information concerning his grievance and that the Union had an obligation under the Act to provide it. There is no evidence, however, that the Union acted in bad faith, fraudulently or otherwise with intent to harm or mislead Lugo when Hardter failed to provide Lugo with the only written documentation generated by the Union concerning his grievance (the September 12 and 27 step 2 and 3 grievance letters). Nor was there evidence that the Union acted in a discriminatory fashion or treated Lugo differently than any other grievant or because of protected activity.[29]

Nevertheless, despite Lugo's oral and written requests, Hardter never furnished him with copies of the letters advancing the grievance to steps 2 and 3. Lugo acknowledged that throughout his attempts to receive a copy of his grievance, Hardter informed him that the grievance had to go or was going through the "steps," but he never shared the details until October 4. Moreover, Hardter waited almost a month (November 27 to December 20) after Lugo's written request to tell Hardter that he had met with the employer and advanced the grievance to the arbitration stage.

Although there is no evidence that Hardter acted in bad faith towards or discriminated against Lugo, I find that his repeated failure to provide Lugo with copies of the Step 2 and 3 grievance documents which he created in mid and late September was without reason, arbitrary and irrational. In cases where the Board had found that a union violated the Act by failing to furnish a member with reasonably requested information, the union had done so without providing any reason for not doing so. See *Nat'l Ass'n of Letter Carriers, AFL–CIO*, 328 NLRB 952, 953, 956 (1999) (the Board found where the union offered no countervailing interests, it acted arbitrarily in its policy of denying members access to their grievance files). See also *Letter Carriers Branch 529*, 319 NLRB 879, above at 881 (union breached its duty of fair representation by refusing to provide charging party who had a legitimate interest with photocopies of her grievance forms).

Hardter believed, but was not sure, that he included grievance information in the packet he provided Lugo on October 8. As such, Respondent argues that if Lugo's testimony that he did not receive a copy of the grievance is credited, the exclusion was the result of mere negligence on the part of Hardter or Cone, and therefore not arbitrary. First, I credit Lugo's testimony in this regard as there was no evidence that he received the grievance documents. Next, Hardter failed to provide any explanation for not furnishing Lugo with the grievance letters he generated in September, over a month after Lugo's initial September 4 request.

[29] Nor was there evidence that Hardter did so because of any other reasons or past dealings with Lugo.

Moreover, I find that Hardter exhibited a disinterested, cavalier attitude regarding Lugo's requests, in that he considered them to be a nuisance in his busy schedule. Indeed, on December 20, he expressed how he had "been very busy with Contract Negotiations, Holiday Party, and oh yeah the other 2000 people whom I represent," to get back to Lugo in a timely manner. This is consistent with the fact that he previously informed Lugo that his grievance was moving through the steps, but never gave him details or copies of the documents. Promptly providing Lugo with copies already in existence would have taken only moments of his or Cone's time. Similarly, Hardter waited over a month (November 27 to December 20) to notify Lugo about his meeting with the employer, inability to settle and advancement of the grievance to arbitration. While Hardter processed Lugo's grievance to arbitration, he arbitrarily and repeatedly failed to provide him with copies of his grievance documents, as well as detailed information about the status of his grievance, without plausible explanation or reason.

Consequently, I find that the Union's actions regarding Lugo's reasonable request for a copy of his grievance documents were arbitrary and a breach of the Union's duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. By refusing to furnish Charging Party Gentry with the Union's charges and complaints against her, including her suspension by Freeman, in the Union's possession and presented to the Referral Hall Committee, Respondent Union violated Section 8(b)(1)(A) of the Act.

3. By refusing to furnish Charging Party Louis Lugo with a copy of his grievance documents, Respondent Union violated Section 8(b)(1)(A) of the Act.

4. Respondent Union's unfair labor practices, described in paragraphs 2 and 3 above, constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order Respondent to provide Charging Party Gentry with the Union's charges and complaints against her, including her suspension by Freeman, in the Union's possession and presented to the Referral Hall Committee. Similarly, I shall order Respondent to provide Charging Party Lugo with copies of his grievance documents.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists, and Allied Crafts of the United States, Its Territories and Canada, AFL–CIO, CLC, (also referred to as IATSE), Local 835, Orlando, Florida, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to provide any member, employee or referent with the Union's charges and complaints against him or her, including discipline by an employer, in the Union's possession.

(b) Refusing to provide any member, employee or referent with copies of his or her grievance documents.

(c) In any like and related manner restraining or coercing any employees or members in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order, provide Charging Party Gentry with the Union's charges and complaints against her, including her suspension by Freeman, in the Union's possession and presented to the Referral Hall Committee.

(b) Within 14 days of the date of this Order, provide Charging Party Lugo with copies of his grievance documents.

(c) Within 14 days after service by the Region, post at its hiring all in Orlando, Florida copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members and referents are customarily posted. In addition to physical posting of paper notices, the notices shall be

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2018 (and November 16, 2018).

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(e) Sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by employers Freeman and GES, if willing, at all places or in the same manner as notices to employees are customarily posted.

Dated, Washington, D.C. April 3, 2020

Donna N. Dawson
Administrative Law Judge

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT refuse to provide any employee, member or referent of Local 835, IATSE, with his or her charges and complaints, including those by an employer, in the Union's possession.

WE WILL NOT refuse to provide any employee, member or referent of Local 835, IATSE, with copies of his or her grievance documents.

WE WILL provide Charging Party Gentry with the Union's charges and complaints against her, including her suspension by Freeman, in the Union's possession and presented to the Referral Hall Committee.

WE WILL provide Charging Party Lugo with copies of his grievance documents.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS, AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC, LOCAL 835 (FREEMAN DECORATING CO.; GLOBAL EXPERIENCE SPECIALISTS, INC.)
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

South Trust Plaza, 201 East Kennedy Boulevard, Suite 300, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CB-233694 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (813) 228-2641.